

1 **(April 7, 2003)**

2 **Disadvantaged Business Enterprise Condition of Award**  
3 **Obligation**

4 The Disadvantaged Business Enterprise (DBE) requirements of 49 CFR  
5 part 26 apply to this contract. This goal is considered a condition of  
6 award.  
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8 **DBE Goals**

9 The Contracting Agency has established a goal in the amount of:

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13 **DBE Eligibility**

14 **Selection of DBEs:**

15 DBEs proposed by the bidder shall be listed as DBEs on the  
16 current list of firms accepted as certified by the Office of Minority  
17 and Women's Business Enterprises (OMWBE.) In absence of  
18 being listed, the Contractor may provide written proof from  
19 OMWBE documenting that their proposed DBEs are currently  
20 certified. A list of firms accepted as certified by OMWBE is  
21 available from that office and on line through their website at  
22 ([www.omwbe.wa.gov/directory/directory.htm](http://www.omwbe.wa.gov/directory/directory.htm)) or call them at  
23 (360) 704-1181.  
24

25 Proposed firms not meeting the specified requirements at the  
26 time fixed for the opening of bids will not be accepted by the  
27 Contracting Agency for the purpose of meeting the goals.  
28

29 The apparent low bidder will be required to substitute a certified  
30 DBE firm in the event that the DBE firm listed is acceptable at  
31 the time of the submission of the bid but, the listed DBE firm is  
32 subsequently determined to be ineligible prior to execution of the  
33 contract.  
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35 The Contracting Agency's determination, prior to award, that a  
36 certified business is capable of performing in the submitted North  
37 American Industry Classification System (NAICS) shall prevail in  
38 determining whether the DBE goals are met. If the Contracting  
39 Agency determines that the submitted firm is not capable, then  
40 the apparent low bidder must substitute a capable DBE firm.  
41 The presence or absence of NAICS codes in the directory  
42 (available as noted previously) shall not be a basis for protest of  
43 an award.  
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45 **Counting DBE Participation Toward Meeting the Goal**

46 When a DBE participates in a contract, only the value of the work  
47 actually performed by the DBE will be counted towards the DBE goal.  
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- 49 1. Count the entire amount of the portion of the contract that is  
50 performed by the DBE's own forces. Include the cost of  
51 supplies and materials obtained by the DBE for the work of  
52 the contract, including supplies purchased or equipment

1 leased by the DBE (except supplies and equipment the DBE  
2 Subcontractor purchases or leases from the Prime  
3 Contractor or its affiliate, unless the Prime Contractor is also  
4 a DBE).

- 5
- 6 2. Count the entire amount of fees or commissions charged by  
7 a DBE firm for providing a bona fide service, such as  
8 professional, technical, consultant, or managerial services,  
9 or for providing bonds or insurance, provided the fees are  
10 reasonable.
- 11
- 12 3. When a DBE subcontracts part of the work of its contract to  
13 another firm, the value of the subcontracted work may be  
14 counted toward the DBE goal only if the DBE's lower tier  
15 Subcontractor is also a DBE. Work that a DBE  
16 Subcontracts to a non-DBE firm does not count toward the  
17 DBE goal.
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### 19 **DBE Prime Contractor**

20 A DBE prime Contractor may only count the work performed with its  
21 own forces and the work performed by DBE Subcontractors and DBE  
22 suppliers.

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### 24 **Joint Venture**

25 When a DBE performs as a participant in a joint venture, only that  
26 portion of the total dollar value of the contract equal to the distinct,  
27 clearly defined portion of the work that the DBE performs with its own  
28 forces will count toward DBE goals.

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### 30 **Commercially Useful Function**

31 Expenditures to a DBE Contractor will count toward DBE goals only if  
32 the DBE is performing a commercially useful function on that  
33 contract.

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- 35 1. A DBE performs a commercially useful function when it is  
36 responsible for execution of the work of the contract and is  
37 carrying out its responsibilities by actually performing,  
38 managing, and supervising the work involved. To perform a  
39 commercially useful function, the DBE must also be  
40 responsible, with respect to materials and supplies used on  
41 the contract, for negotiating price, determining quality and  
42 quantity, ordering the material, installing (if applicable) and  
43 paying for the material itself.
- 44
- 45 2. A DBE does not perform a commercially useful function if its  
46 role is limited to that of an extra participant in a transaction,  
47 contract, or project through which funds are passed in order  
48 to obtain the appearance of DBE participation.
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### 50 **Sharing Resources with a DBE**

51 In the event the DBE expects to share the resources of another  
52 Contractor (Prime and/or Sub.), a written plan describing the facilities,

1 financial assistance or personnel to be shared shall be submitted by  
2 the Contractor to the Engineer and approved by the Contracting  
3 Agency prior to the DBE commencing work. Supplies and equipment  
4 the DBE Subcontractor purchases or leases from the Contractor or its  
5 affiliate are not counted.  
6

### 7 **Trucking**

8 Use the following factors in determining whether a DBE trucking  
9 company is performing a commercially useful function:

- 10  
11 1. The DBE must be responsible for the management and  
12 supervision of the entire trucking operation for which it is  
13 listed on a particular contract.  
14
- 15 2. The DBE must itself own and operate at least one fully  
16 licensed, insured, and operational truck used on the  
17 contract.  
18
- 19 3. Credit towards project goals for DBE trucking firms who do  
20 not own at least one truck will be granted only for the fees  
21 the DBE firm retains for performing their portion of the work.  
22
- 23 4. The DBE receives credit only for the total value of the  
24 transportation services it provides on the contract using  
25 trucks it owns, insures, and operates with drivers it employs.  
26
- 27 5. For purposes of this paragraph a lease must indicate that  
28 the DBE has exclusive use of and control over the truck.  
29 This does not preclude the leased truck from working for  
30 others during the term of the lease with the consent of the  
31 DBE, so long as the lease gives the DBE absolute priority  
32 for use of the leased truck. Leased trucks must display the  
33 name and identification number of the DBE.  
34
- 35 6. The DBE may lease trucks from another DBE firm, including  
36 an owner-operator who is certified as a DBE. The DBE who  
37 leases trucks from another DBE receives credit for the total  
38 value of the transportation services the lessee DBE provides  
39 on the contract.  
40
- 41 7. The DBE may also lease trucks from a non-DBE firm,  
42 including an owner-operator. The DBE who leases trucks  
43 from a non-DBE is entitled to credit only for the fee or  
44 commission it receives as a result of the lease arrangement.  
45 The DBE does not receive credit for the total value of the  
46 transportation services provided by the lessee, since these  
47 services are not provided by a DBE.  
48
- 49 8. In order for DBE project goals to be credited, DBE trucking  
50 firms must be covered by a subcontract or a written  
51 agreement approved by WSDOT prior to performing their  
52 portion of the work.

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9. In order to perform a CUF, the DBE trucking firm is restricted to the same subcontracting limitation in effect for other Contractors. Based on standard subcontracting limitations, the DBE trucking firm shall be required to perform at least fifty percent (50%) of the work with his/her own trucks and personnel.

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**Expenditures paid to other DBEs**

Expenditures paid to other DBEs for materials or supplies may be counted toward DBE goals as provided in the following:

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**Manufacturer**

1. Counting  
If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
2. Definition  
To be a manufacturer, the firm operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
3. In order to receive credit as a DBE manufacturer, the firm must have received an "on-site" review and been approved by WSDOT-OEO to operate as a DBE Manufacturing firm prior to bid opening on any USDOT federally-assisted contract. Use of a DBE manufacturer that has not received an on-site review and approval by WSDOT-OEO prior to bid opening will result in the bid being declared non-responsive (unless the contribution of the DBE manufacturer was not necessary to meet the project goal). To schedule a review, the manufacturing firm must submit a written request to WSDOT/OEO and may not receive credit towards DBE participation until the completion of the review. Once a firm's manufacturing process has been approved in writing, it is not necessary to resubmit the firm for approval unless the manufacturing process has substantially changed. Information on approved manufacturers (per contract) may be obtained from WSDOT-OEO.

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**Regular Dealer**

1. Counting  
If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies will count toward DBE goals.
2. Definition  
a) To be a regular dealer, the firm must own, operate or maintain a store, warehouse, or other establishment in

- 1 which the materials, supplies, articles or equipment of  
2 the general character described by the specifications  
3 and required under the contract are bought, kept in  
4 stock, and regularly sold or leased to the public in the  
5 usual course of business. It must also be an  
6 established, regular business that engages, as its  
7 principal business and under its own name, in the  
8 purchase and sale or lease of the products in question.  
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- 10 b) A person may be a regular dealer in such bulk items as  
11 petroleum products, steel, cement, gravel, stone, or  
12 asphalt without owning, operating, or maintaining a  
13 place of business, as provided elsewhere in this  
14 specification, if the person both owns and operates  
15 distribution equipment for the products. Any  
16 supplementing of regular dealers' own distribution  
17 equipment shall be by a long-term lease agreement and  
18 not on an ad hoc or contract-by-contract basis.  
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- 20 c) Packagers, brokers, manufacturers' representatives, or  
21 other persons who arrange or expedite transactions are  
22 not regular dealers.  
23
- 24 3. Regular dealer status is granted on a contract by contract  
25 basis. To obtain regular dealer status, a formal written  
26 request must be made by the interested supplier (potential  
27 regular dealer) to WSDOT/OEO. OEO must be in receipt of  
28 this request at least seven (7) calendar days prior to bid  
29 opening. Included in the request shall be a full description  
30 of the project, type of business operated by the DBE, and  
31 the manner the DBE will operate as a regular dealer on the  
32 specific contract. Rules applicable to regular dealer status  
33 are contained in 49 CFR Part 26.55. 6. Once the request is  
34 reviewed by WSDOT-OEO, the DBE supplier requesting it  
35 will be notified in writing whether regular dealer status was  
36 approved. DBE firms that are approved as regular dealers  
37 for a contract (whenever possible) will be listed on the  
38 WSDOT Internet Homepage at:  
39 [www.wsdot.wa.gov/fossc/cons/contaa/](http://www.wsdot.wa.gov/fossc/cons/contaa/) prior to the time of  
40 bid opening. In addition, bidders may request confirmation  
41 of the DBE supplier's approval to operate as a regular  
42 dealer on a specific contract by writing the Office of Equal  
43 Opportunity, Washington State Department of  
44 Transportation, P.O. Box 47314, Olympia, WA 98504-7314  
45 or by phone at (360) 705-7085. Use of a supplier that has  
46 not received approval as a regular dealer prior to bid  
47 opening will result in the bid being declared nonresponsive.  
48 (unless the contribution of the regular dealer was not  
49 necessary to meet the project goal).  
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### **Materials or Supplies Purchased from a DBE**

With respect to materials or supplies purchased from a DBE who is neither a manufacturer nor a regular dealer, the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site may be counted toward the goal, provided the fees are reasonable and typical for the services rendered. No part of the cost of the materials and supplies themselves may be applied toward DBE goals.

### **DBE Utilization Certification**

The bidder shall submit with the bid, a Disadvantaged Business Enterprise Utilization Certification which has been made a part of the proposal. The Contracting Agency shall consider as non-responsive those bids submitted which do not contain a certification that meets all contract requirements.

### **Selection of Successful Bidder/Good Faith Efforts**

The successful bidder shall be selected on the basis of having submitted the lowest responsive bid and demonstrates that they have made good faith efforts by doing either of the following two things:

1. Document, through the DBE utilization certification mentioned previously, that it has obtained enough DBE participation to meet the goal. The goal amount will become the condition of award (COA) amount.
2. Document that it made adequate good faith efforts to meet the contract goal, even though it did not succeed in obtaining enough DBE participation, as noted in the DBE utilization certification, to do so. In this case the goal will be reduced to the Contractor's partial commitment which will become the condition of award (COA) amount.

Should the low and otherwise responsive bidder fail to attain the goal and provide adequate good faith effort documentation in the bid submittal, its bid may be rejected and the next low responsive bid accepted.

Should more than one bidder fail to meet the goal, WSDOT and its subrecipients will determine the adequacy of the low bid and otherwise responsive bidder's submission in light of DBE participation attained by all bidders. This will be accomplished by comparing the low bidder's submission to the average DBE participation by all bidders. When computing the average DBE participation, only the amount of the DBE attainment which does not exceed the established goal shall be used. Should the low bidder's DBE participation be lower than the average, the bid shall be considered nonresponsive and shall be rejected. If the lowest bid is rejected, the next lowest bid(s) shall be

1 examined under the forgoing criteria until the contract is  
2 awarded or all bids are rejected.  
3

4 In the event a bidder is unable to meet the assigned DBE  
5 contract goal, the bidder shall provide additional information  
6 regarding its good faith efforts to do so per the requirements  
7 of this contract. The bidder must document the steps taken  
8 to obtain participation which demonstrate good faith efforts,  
9 as follows:  
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- 11 a. Evidence the bidder attended any pre-solicitation  
12 or pre-bid meetings that were scheduled by  
13 WSDOT to inform DBEs of contracting and  
14 subcontracting or material supply opportunities  
15 available on the project;  
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- 17 b. Evidence the bidder identified and selected specific  
18 economically feasible units of the project to be  
19 performed by DBEs in order to increase the  
20 likelihood of participation by DBEs;  
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- 22 c. Evidence the bidder advertised in general  
23 circulation, trade association - minority and trade  
24 oriented - women focused publications, concerning  
25 the subcontracting or supply opportunities;  
26
- 27 d. Evidence the bidder provided written notice to a  
28 reasonable number of specific DBEs, identified  
29 from the OMWBE Directory of Certified Firms for  
30 the selected subcontracting of material supply  
31 work, in sufficient time to allow the enterprises to  
32 participate effectively;  
33
- 34 e. Evidence the bidder followed-up initial solicitations  
35 of interest by contacting the DBEs to determine  
36 with certainty whether they were interested. This  
37 may include the information outlined below:  
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  - 39 1. The names, addresses, telephone  
40 numbers of DBEs who were contacted,  
41 the dates of initial contact, and whether  
42 initial solicitations of interest were  
43 followed-up by contacting the DBEs to  
44 determine with certainty whether the  
45 DBEs were interested;  
46
  - 47 2. A description of the information provided  
48 to the DBEs regarding the plans,  
49 specifications, and estimated quantities  
50 for portions of the work to be performed;  
51

1 3. Documentation of each DBE contacted  
2 but rejected and the reason(s) for that  
3 rejection;  
4

5 f. Evidence the bidder provided interested DBEs with  
6 adequate information about the plans,  
7 specifications, and requirements for the selected  
8 subcontracting or material supply work;  
9

10 g. Evidence the bidder negotiated in good faith with  
11 the DBE firms, and did not without justifiable  
12 reason, reject as unsatisfactory, bids that are  
13 prepared by any DBE;  
14

15 h. Evidence the bidder advertised and made efforts to  
16 obtain DBE participation were reasonably expected  
17 to produce a level of participation sufficient to meet  
18 the goal or requirements of WSDOT;  
19

20 i. Evidence the bidder's efforts to obtain DBE  
21 participation were reasonably expected to produce  
22 a level of participation sufficient to meet the goal or  
23 requirements of WSDOT;  
24

25 j. Evidence the bidder used the services of minority  
26 community organizations, minority Contractor  
27 groups, local, state, and federal minority business  
28 assistance offices and other organizations  
29 identified by WSDOT, advocates for  
30 disadvantaged, minority, and women businesses  
31 that provide assistance in the recruitment and  
32 placement of disadvantaged, minority, and women  
33 business enterprises; and  
34

35 k. Evidence the bidder made use of DBE Supportive  
36 Services by contacting the Office of Minority and  
37 Women's Business Enterprises DBE Supportive  
38 Services Offices:  
39

40 Olympia: (360) 753-9693,  
41 (Fax) (360) 586-7079  
42 Seattle: (206) 553-7356,  
43 (Fax) (206) 553-0194  
44 Wenatchee: (509) 665-3528,  
45 (Fax) (509) 665-3533  
46

47 **Administrative Reconsideration**

48 1. A bidder has the right to reconsideration in the event that they  
49 have been found to be nonresponsive due to a failure to meet  
50 the requirements of this specification. The bidder must request  
51 reconsideration within five working days of notification of being  
52 nonresponsive or forfeit the right to reconsideration.



2. As part of this reconsideration, the bidder will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.
3. The Contracting Agency's decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so.
4. The bidder shall have the opportunity to meet in person with said official to discuss the issue of whether it met the goal or made good faith efforts to do so.
5. The Contracting Agency shall send the bidder a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

The result of the reconsideration process is final and not administratively appealable to the USDOT.

#### **Procedures Between Award and Execution**

Failure to provide information meeting the DBE requirements as described shall be reason to cause forfeiture of the proposal bond or deposit of this bidder.

The Contracting Agency will notify the successful bidder of the award of the contract in writing and include a request for a further breakdown of the DBE information. After award and prior to execution of the contract, the Contractor shall submit, in writing the names and addresses of all firms that submitted a bid or quote to the Contractor as part of bidding the contract. The submittal shall note which of those firms are DBE firms and which firms were successful and will participate in the contract.

The firms may be contacted to solicit general information as follows:

1. age of the firm
2. average of its gross annual receipts

This information is necessary to maintain a bidder's list in compliance with the requirements of the CFR Title 26. It will be used by the Contracting Agency to determine who is seeking the work and what is their capacity. This will assist in performing an assessment of whether the Contracting Agency's overall goal accurately represents the percentage of DBEs who are ready, willing and able to perform the work.

## **Reporting**

The Contractor shall submit a "Quarterly Report of Amounts Credited as DBE Participation" on a quarterly basis for any quarter in which DBE work is accomplished or upon completion of the project, as appropriate. The quarterly reports are due on the 20 th of (April, July, October, January) for the four respective quarters. The dollars reported will be in accordance with the "**DBE Eligibility**" section of this specification.

## **Deletion of Work**

### **Contracting Agency Initiated Reduction of COA Related Work**

In the event the Contracting Agency elects to delete COA related work, the DBE goal shall be reduced by the appropriate amount committed for the deleted work.

If the contract allows alternate work methods which reduce or eliminate COA work, then the Contractor is required to substitute other work of equivalent value to a certified DBE or provide documentation of good faith efforts to do so.

### **Contractor Initiated Reduction of COA Related Work**

In the event that DBE work is diminished or deleted by actions taken by the Contractor, the Contractor will be required to substitute other work of equivalent value to a certified DBE or provide documentation of good faith efforts to do so.

## **Penalties for Noncompliance**

When a Contractor violates the DBE provisions of the contract, the Contracting Agency may incur damages. These damages consist of additional administrative costs including, but not limited to, the inspection, supervision, engineering, compliance, and legal staff time and expenses necessary for investigating, reporting, and correcting violations as well as loss of federal funding. Damages attributable to a Contractor's violations of the DBE provisions may be deducted from progress payments due to the Contractor or from retainage withheld by the Contracting Agency as allowed by RCW 60.28.020. Before any money is withheld, the Contractor will be provided with a notice of the basis of the violations and an opportunity to respond.

The Contracting Agency's decision to recover damages for a DBE violation does not limit its ability to suspend or revoke the Contractor's pre-qualification status or seek other remedies as allowed by federal or state law. In appropriate circumstances, the Contracting Agency may also refer the Contractor to state or federal authorities for additional sanctions.

## **Payment**

Payment for complying with the conditions of this specification and any associated DBE requirements is to be included in the incidental items of work.

1                   **Further Information**  
2                   If further information is desired concerning Disadvantaged Business  
3                   Enterprise participation, inquiry may be directed to:  
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5                   External Civil Rights Branch  
6                   Office of Equal Opportunity  
7                   Washington State Department of Transportation  
8                   Transportation Bldg., P.O. Box 47314  
9                   Olympia, WA 98504-7314  
10                  or telephone - (360) 705-7085.  
11                  Fax (360) 705-6801